IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 23RD FEBRUARY 2007 / 4TH PHALGUNA 1928

OP.No. 12351 of 2002(U)

PETITIONERS:
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1. **SUNNY PAUL, KURIAN'S COTTAGE,**
   ST.BENEFICT ROAD, ERNAKULAM.

2. **JOHNY PAUL -D0-**

3. **JOIJY PAUL -DO-**

4. **JIMMY PAUL -DO-**

5. **PENNAMMA PAUL -DO-**

BY ADV. SRI.P.S.GEORGE

RESPONDENTS:
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1. **THE REVENUE DIVISIONAL OFFICER,**
   FORT COCHIN.

2. **THE TAHSILDAR,**
   KANAYANNUR.

BY GOVERNMENT PLEADER SRI.C.K.GOVINDAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 23/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.NO.12351/2002 U

ORDER ON C.M.P.NO.21071/2002 IN O.P.NO.12351/2002 U

DISMISSED

23/02/2007 **SD/- ANTONY DOMINIC, JUDGE**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF AGREEMENT DTD. 26/04/97 EXECUTED BY THE PETITIONERS.**

EXT.P2: **COPY OF SALE DEED NO.3490/97 SRO ERNAKULAM DTD.8/9/91.**

EXT.P3: **COPY OF SALES TAX REGISTRATION CERTIFICATE (KGST) DTD. 14/08/96 ISSUED TO KURIAN BUILDERS.**

EXT.P4: **COPY OF SALES TAX REGISTRATION CERTIFICATE (CST) DTD. 14/08/96 ISSUED TO KURIAN BUILDERS.**

EXT.P5: **COPY OF PROPERTY TAX ASSESSMENT ORDER DTD. 3/07/98.**

EXT.P6: **COPY OF RETURN OF BUILDING TAX ASSESSMENT DTD.NIL.**

EXT.P7: **COPY OF ASSESSMENT ORDER DTD. 3/02/99 PASSED BY THE 2ND RESPONDENT.**

EXT.P8: **COPY OF JUDGMENT DTD. 5/03/99 IN O.P.NO.5390/99 OF HIGH COURT OF KERALA.**

EXT.P9: **COPY OF ASST.ORDER DTD. 3/05/99 PASSED BY THE 2ND RESPONDENT.**

EXT.P10: **COPY OF ORDER DTD. 29/01/2002 PASSED BY THE 1ST RESPONDENT.**

EXT.P11: **COPY OF APPEAL MEMO DTD. 2/06/99 FILEDBEFORE THE 1ST RESPONDENT.**

/TRUE COPY/

Kss

ANTONY DOMINIC, J.

O.P NO. 12351 OF 2002

Dated this the 23rd day of February, 2007

J U D G M E N T

This original petition has been filed by the four petitioners therein, seeking a declaration that the individual owners mentioned in Ext.P6 series returns are liable to be assessed to building tax individually for their respective portions, of the building known as Kurian Towers, Banerji Road, Ernakulam. They also seek writ of mandamus directing the 1st respondent to dispose of Ext.P11 appeal in the light of the principles laid down by this court in the judgment reported in **Balu v. State of Kerala (1994(2) KLT 42).**

2. The facts which lead to the filing of this original petition are that petitioners altogether held 30.5 cents of land in Sy.No.318/7 and 1921/3 of Ernakulam village. It is said that petitioners 1 and 4 owned 13 cents and petitioners 2, 3 and 5 together held 17.5 cents out of which 3 cents are set apart for parking area. They obtained sanction from the Kochi Corporation for the construction of a commercial complex in the aforesaid plot of land and thereafter, advertisement was issued inviting

responses from interested parties for the purchase of undivided share in the aforesaid plot of land. It is said that based on the responses so received, individual agreements were entered into with 36 such purchasers and Ext.P1 is a specimen copy of one such agreement. The agreement contains provisions for purchasing specified share in the land for the construction of room in terms of the approved plan, which is also earmarked in the agreement and the agreement requires the purchaser to entrust the construction to a builder named in the agreement. It is said that on the basis of the agreements so entered into, the builder proceeded with the construction and the construction of the commercial complex was completed on 22/10/97. Accordingly, occupancy certificate was also issued by the Corporation of Kochi. It is also revealed that six rooms in the Complex are held in the names of the petitioners themselves.

3. In order to discharge their obligations under the Kerala Building Tax Act (hereinafter referred to as “the Act” for short), it is said that the individual purchasers who are also the owners of portions of the building constructed, filed individual returns, and Ext.P6 series produced in this Original Petition, are the returns so

filed by the respective owners themselves. According to the petitioners, under the Act, the individual owners were liable to be assessed for their respective portions. However, by Ext.P7, the assessment was completed assessing the whole building as a single unit and levying tax on the petitioners being the erstwhile landlords of the land, where the commercial complex was constructed. On receipt of the assessment order, without opting to pursue the statutory remedies that are available to them, they filed an original petition before this court as OP No.5390/99, seeking to have the assessment order quashed and for directing the Assessing Authority to assess the individual units separately, and levy tax on the respective owners thereon. By Ext.P8 judgment, this court disposed of the OP relegating the petitioners to pursue their statutory remedies and also giving them one more opportunity to adduce evidence in support of their contention that, separate apartments in the shopping complex are constructed by each persons with their funds and that the petitioners are liable only in respect of the apartments owned by them in the shopping complex. Proceeding further, it was also directed that, it is also open to the first respondent, the Assessing

Authority, to consider the returns filed by the purchasers of the apartments in the said shopping complex while considering the assessment in the case of the petitioners. This court had imposed a condition that the petitioners should remit Rs.2,50,000/- out of Rs.10,41,750/- levied as per Ext.P7, and recorded the submission that the payment thus effected will be adjusted against the individual liability of petitioners 1 to 5, if so determined in the final assessment.

4. The matter being so remanded to the Assessing Authority, after affording an opportunity to the petitioners as directed by this Court, the Assessing Authority completed the assessment as per Ext.P9 assessment order. In Ext.P9, after referring to Explanation 2 to Section 2(e) of the Act the Assessing Authority finalised the assessment in the name of the petitioners themselves on the basis that they were the owners of the land in which the building was constructed. The reason as reflected in the order is that though the building was completed on 22/10/97, the sale deeds in favour of the purchasers were executed only subsequent thereto. According to him, in as much as the sale deeds were executed, after completion of the building, it is

obvious that none of the owners, were owners of the building at the time of completion of the building. On that basis, the Assessing Authority concluded that the liability to pay building tax is on the petitioners, treating the building as a single unit and directed that the balance amount of Rs.7,91,750 shall be remitted by the petitioners in quarterly instalments. Aggrieved by the assessment order thus issued, the petitioners preferred appeal under Section 11 of the Act before the 1st respondent and Ext.P11 is the appeal memorandum. A reading of Ext.P11 would disclose that, various grounds in support of their contention supporting assessment in the individual names of the purchasers have been urged by them. It is stated that the counsel had filed an argument note on 16/1/2002 in addition to the hearing granted to the parties on two occasions. Thereafter the Appellate Authority disposed of the matter by Ext.P10 order. However, taking note of the fact that, there were some sale deeds executed prior to the completion of the construction, the Appellate Authority remanded the matter to the 2nd respondent directing him to consider the sale deeds that were executed prior to the completion of the construction. It is challenging these orders and seeking the

prayers mentioned earlier that this original petition has been filed by the petitioners.

5. Mr.Roy Chacko, counsel for the petitioners complains that the assessment order and the appellate order are liable to be set aside on the ground that while completing the assessment by Ext.P9, the Assessing Authority has not taken into account the direction of the learned Single Judge requiring him to take note of the individual returns filed by the petitioners. He also placed reliance on the judgments of this court reported in **Balu v. State of Kerala (1994(2) KLT 42), Bhattathiripad v. Thasildar** (**1994(1) KLT 790)** and **Kurian George v. Tahsildar (1995(2) KLT 457)** and **Lissy v. Tahsildar** (**2000(3) KLT 497)**. According to him these judgments laid down the principle that individual units in a Building complex ought to be assessed on the basis that they are separate apartments or units, applying explanation 2 to Section 2(e) of the Act. He also contends that individual returns filed by the 36 purchasers were accepted by the Assessing Authority and he ought to have issued notice to such individual purchasers as required under Section 9(4) of the Act and this having not been done, Ext.P9 assessment order, as

confirmed by the Ext.P10 appellate order, is illegal. It is also contended that in the attempt of the respondents as reflected in the counter affidavit is to make improvements in the impugned order which is also impermissible as the validity of the orders impugned is to be tested in the light of its contents and not in the light of the reasons that are supplemented through the counter affidavit. In support of this proposition, he relies on the judgment of the Supreme Court in the case of **Mohinder Singh v. Chief Election Commissioner** reported in (**AIR 1978 SC 851)**.

6. Per contra, the learned Government Pleader submits that, it was the obligation of the petitioners to have produced documents to show that their case comes within the second explanation to Section 2(e) of the Act. According to him, the petitioners failed to produce any documents evidencing that the cost of construction was met by the so called purchasers and in the absence of which, the Assessing Authority was justified in concluding that the building has to be assessed as a single unit and making the petitioners liable for the building tax. He also relies on the judgment of this court in **Rasheed v. Tahsildar (2004 (3) KLT 945)** and **P.P.Varghese v. The Tahsildar**

(2006(1) KLJ 749).

7. Heard both sides.

8. Exhibit P9 is the assessment order and Exhibit P10 is the appellate order in this case. The only reason contained in Exhibit P9 assessment order for assessing the building as a single unit and levying the entire burden of tax on the petitioners is that though the construction of the building was completed on 22/10/97, the sale deeds were executed subsequent thereto. According to the Assessing Authority, at the time when construction was completed, none of these purchasers were owners of the land and therefore petitioners are the actual owners of the building for the purpose of assessment of Building Tax. In appeal, despite the fact that several contentions have been urged in the memorandum of appeal supplemented by atleast two argument notes and arguments led, the Appellate Authority, without reference to any one of them has only held that there are some sale deeds which were executed prior to the completion of the construction and remanded the matter, directing the Assessing Authority to consider the sale deeds which are executed prior to the completion of construction.

9. While examining the correctness or otherwise of the reasoning of the Assessing Authority and the Appellate Authority, one has to necessarily make reference to Section 2(e) of the Act which defines 'building' and in particular the second explanation, which alone is material for the purpose of this case. Explanation 2 provides that where a building consists of different apartments or flats owned by different persons and the cost of construction of the building was met by all such persons jointly, each such apartment or flat shall be deemed to be a separate building for the purposes of the Act. This provision came up for consideration before this court on various occasions. **Balu v. State of Kerala (1994(2) KLT 42),** was a case where a flat complex was constructed with owners having undivided interest in the land which was transferred to such owners subsequent to the construction of flats as in this case. Interpretting Section 2(e) of the Act in the light of the explanation, the learned Judge held as follows:

> The sole question for decision is whether the assessment of the entire building consisting of twenty two flats as one unit is legal and valid. There is no dispute about the facts of the case. The building is an integral one consisting of

twenty two flats. It is a multi storeyed one. The land belongs to the various flat owners in co-ownership, after the transfer effected to them of the undivided interest in the land, the transfer being effected after the construction of the flats was complete. What Explanation 2 lays down is that if a building consists of different apartments or flats owned by different persons, and the cost of construction of the building is met by such persons jointly, each apartment or flat shall be deemed to be a separate building. The ingredients of the Explanation are (a) the existence of a building, (b) that building must consist of different apartments or flats, © the apartments or flats must be owned by different persons and (d) the cost of construction of the building should be met by such persons jointly. If these ingredients concur, each of the apartments or flats will be deemed to be a separate building, though the building is one structurally and there is an integral connection between the various parts of the building. The Explanation in effect splits on otherwise integral unit or building into multiple buildings, liable to be assessed separately. It would have been otherwise going by the main part of the definition alone. Evidently this has been done to encourage construction of apartments and flats and to alleviate the burden that will otherwise fall heavily by assessing the entire building as one unit. The fact that the undivided interest in the land is transferred only subsequent to the construction of the flats is in my opinion irrelevant in deciding on the applicability of Explanation 2. The building in this case therefore satisfies the conditions of Explanation 2 to S.2(e). The assessing authority has not given any reasons in Ext.P7 to deny the benefit of separate assessment to the flat owners in this case, or any justification for assessing the

> entire building as one unit on the developer. Such assessments without keeping in mind the basic philosophy underlying the Explanation will only act as a damper to such construction activity in the State.

This section again came up for consideration before Division Bench in the case of **Kurian George v. Tahsildar (1995(2) KLT 457)** and the import of the Explanation 2 to Section 2(e) has been held by the Bench to be as follows:

> When a building is constructed, consisting of separate and distinct apartments or flats, jointly by a group of persons, each flat or apartment shall be treated as separate building, if each one of the co-owners claims a portion of the building as his and each of the co-owner's is the owner of that portion of the building having absolute title to it. Further a flat or apartment should be owned by one of the co-owners to the exclusion of others. In other words, none of the owners of portions of the structure should have any right over the whole building except the portion which is owned and possessed by him. It is more so when the partition of the land has been clearly effected and the building was being put up, as one structure, though belonging to different owners in defined portion.

These judgments have been followed by yet another decision of a Division Bench of this court in the case of **Lissy v. Tahsildar (2000(3) KLT 497)** where it has also been held that

the expression 'flat' occuring in the Explanation does not limit the meaning of the expression to residential premises alone, but it also includes those used for commercial purposes as well. Judgments cited by the learned Government Pleader, as I read it, do not depart from the principles laid down by this Court in the aforesaid judgments and therefore, a detailed reference is not warranted. Thus the relevant considerations for the purpose of an assessment, as in this case, are basically those indicated by the learned Single Judge in **Balu v. State of Kerala;** which are the existence of a building, that the building must consist of different apartments or flats, the apartments or flats must be owned by different persons and the cost of construction of the building should be met by such persons jointly. A reading of the assessment order and the appellate order discloses that both the authorities have misdirected themselves and have not appreciated the case applying the import of the second explanation to Section 2(e) of the Act to the facts of the case. The point of time when the land was transferred is immaterial for this purpose. For this reason, I am not able to sustain the assessment order or the appellate order.

10. Sri.Roy Chacko also complains that while the Assessing Authority has reconsidered the matter pursuant to Ext.P8 judgment of this Court, he ought to have taken into consideration Exhibit P6 series individual returns, filed by the 36 purchasers as also by the petitioners themselves. A reading of Ext.P8 judgment shows that the learned Judge had held that it will be open to the Assessing Authority to examine such individual returns as well. It is true, as rightly pointed out by Sri.Roy Chacko that, the assessment order or the appellate order does not make any reference to such individual returns and therefore Mr.Roy Chacko is justified in his submission in this respect.

11. In the light of my findings as above, Exhibits P9 and P10 assessment order and the appellate order deserves to be quashed and I do so. The 2nd respondent, the Assessing Authority is to take up the matter again and complete the assessment applying the provisions contained in the second explanation to Section 2(e) of the Act, in the light of the judgments rendered by this court as noticed herein above and the observations made herein, and complete the assessment, with notice to the petitioners, as expeditiously as possible. Since I am disposing of

the matter confining my findings to the aforesaid two issues, I am not pronouncing upon the correctness of the other contentions raised by the counsel for petitioners.

12. It is made clear that, the remittance which has already been made by the petitioners as directed in Ext.P8 judgment will be adjusted towards the liability as finally determined, on completion of the assessment.

Original petition is allowed in the above terms. No costs.

ANTONY DOMINIC, JUDGE

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